

October 26, 2022

**Submitted Via E-Mail: regulations@dbo.ca.gov**

Ms. Clothilde V. Hewlett  
Commissioner  
California Department of Financial Protection and Innovation  
2101 Arena Blvd.  
Sacramento, California 95834  
Attn: Sandra Navarro

**Re: Comments re Proposed Rulemaking: PRO 06-21**

Dear Commissioner Hewlett:

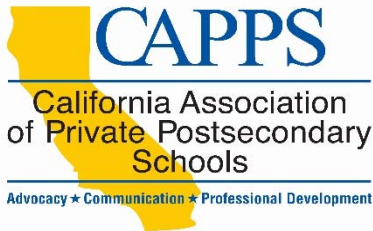
As Executive Director of the California Association of Private Postsecondary Schools (“*CAPPS*”), the following correspondence provides our comments on the proposed regulations published by the California Department of Financial Protection and Innovation (the “*Department*” or “*DFPI*”) in the September 9, 2022 Notice of Proposed Rulemaking: PRO 06-21. Our comments address the Department’s proposal to “clarify” that all education financing products, including retail installment contracts, are student loans within the definition of “student loan” in the Student Loan Servicing Act (the “*Act*”).

CAPPS is the only California state association that represents all of the diverse range of private postsecondary schools in California. CAPPS has more than 200 institutional members, including proprietary, non-profit, and religious institutions. Our schools are either institutionally accredited or approved by California’s Bureau of Private Postsecondary Education to offer educational services. CAPPS works to ensure that the needs of the entire sector – from small schools to large institutions – are met from a policy, educational, and business perspective.

**Introduction**

For the reasons set forth below, we express our opposition to the Department’s proposed “clarification” that all education financing products, including retail installment contracts and other non-loans products, are student loans within the definition of a “student loan” in the Act, and request that the Department rescind this proposed interpretation and recognize that it is not the case that all education financing products are student loans within the definition set forth in the Act and, in particular, that retail installment contracts are not student loans as defined within the Act.

California Association of Private Postsecondary Schools  
[Redacted Signature]



## Analysis

### ***A. There Is a Distinction Under California Law Between Loans and Retail Installment Sales and Retail Installment Sales Are Not Loans***

The California legislature is keenly aware of the distinction between loans and retail installment sales. Thus, the California legislature has passed separate statutes governing consumer loans and retail installment contracts.

The California Financing Law (California Financial Code, Sections 22000 *et. seq.* (“**CFC**”)) requires that “[n]o person shall engage in the business of a finance lender or broker without obtaining a license from the commissioner.” (CFC, Section 22100(a).) The term, “finance lender,” is defined to include “any person who is engaged in the business of making consumer loans or making commercial loans.” The term, “loan,” is not defined in the California Financing Law.

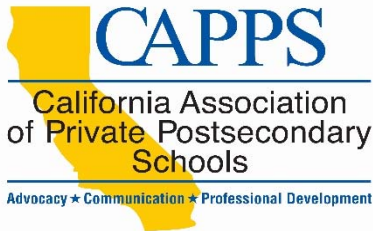
In contrast, California’s Retail Installment Sales law, or “Unruh Act,” governs retail installment sales and retail installment contracts. Retail installment sales are not loans and, as a result, are not governed by or subject to the provisions of the California Financing Law. Thus, retail installment sellers are not subject to the licensure requirements of the California Financing law.

The Department has already recognized the distinction between loans and retail installment sales, which it attempts to ignore in the proposed regulations. The following statement is excerpted from the DFPI’s webpage entitled, “About California Financing Law”:

A finance lenders license provides the licensee with an exemption from the usury provision of the California Constitution. **There are a number of “non-loan” transactions, such as** bona fide leases, automobile sales finance contracts (Rees-Levering Motor Vehicle Sales and Finance Act) and **retail installment sales (Unruh Act), that are not subject to the provisions of the California Financing Law.** In addition to requiring a license for certain lending activity, the California Financing Law requires a license for certain brokering activity.

(Emphasis added; source: <https://dfpi.ca.gov/california-financing-law/california-financing-law-about/>.)

California Association of Private Postsecondary Schools



We also note the Department’s interpretive letter issued on December 20, 2019 (File No: OP 7667). On page 2 of the interpretive letter, under the heading “Factors indicating a ‘loan’ versus ‘sale’,” the Department clearly states and confirms that retail installment sales are distinct from loans:

[W]e acknowledge that [the requestor’s] products also have the indicia of retail installment sales, which are not loans. . . . While in your letter you suggest that [the requestor’s] products should be “unregulated” (citing [deferred payment products offered by other companies] as examples of “unregulated” products), we note that even retail installment sales, are not unregulated but, rather, regulated under a different statutory scheme.

(source: <https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/12/Deferred-Payment-Products-cfl.pdf>.)

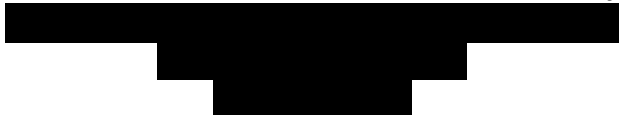
Thus, it is well-established and recognized by the California legislature and the Department that retail installment sales are distinct from and are not loans.

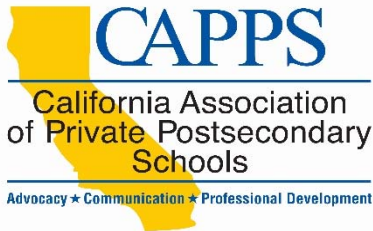
The Department’s proposed rulemaking asserts that the Department has concluded that all education financing products, including installment contracts, are loans for purposes of the Act. However, this cannot be the case. As noted above, the California legislature is keenly aware of the distinction between loans and retail installment sales. If the legislature intended the Act to apply to retail installment sales in addition to loans, the legislature would have included clear language to that effect.

The Act includes the following definition of “student loan,” set forth in CFC Section 28104:

- (1) (1) “Student loan” means any **loan** made solely for use to finance a postsecondary education and costs of attendance at a postsecondary institution, including, but not limited to, tuition, fees, books and supplies, room and board, transportation, and miscellaneous personal expenses. A “student loan” includes a **loan** made to refinance a student loan.
- (2) (A) A “student loan” shall not include an extension of credit under an open-end consumer credit plan, a reverse mortgage transaction, a residential mortgage transaction, or any other loan that is secured by real property or a dwelling.
- (B) A “student loan” shall not include an extension of credit made by a postsecondary educational institution to a borrower if one of the following applies:
  - (i) The term of the extension of credit is no longer than the borrower’s education program.

California Association of Private Postsecondary Schools





- (ii) The remaining, unpaid principal balance of the extension of credit is less than one thousand five hundred dollars (\$1,500) at the time of the borrower's graduation or completion of the program.
- (iii) The borrower fails to graduate or successfully complete the borrower's education program and has a balance due at the time of the borrower's disenrollment from the postsecondary institution.

(Emphasis added.)

While the carve-outs set forth in subsection (2) include the broader term "extension of credit," the actual definition set forth in subsection (1) refers only to the term, "loan." Thus, the scope of the Act is limited to loans only and does not extend to retail installment contracts. As the Department has already recognized, retail installment sales are not loans. Accordingly, retail installment sales do not and cannot fall within the definition of "student loan" set forth in the Act.

Based on the foregoing, the Department should limit its proposed rulemaking to that specifically and clearly directed by the California legislature.

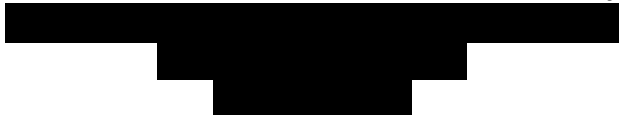
***B. The Department Lacks Legal and Statutory Authority to Apply the Act to Retail Installment Sales and Other Non-Loan Education Finance Products***

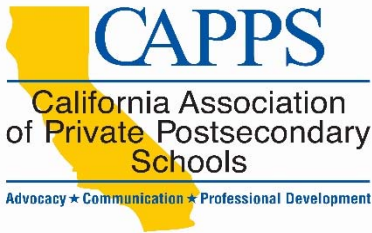
The Department cites CFC Section 28106(a) as granting the Commissioner sufficient authority to promulgate the Department's proposed rulemaking." In this regard, the Department asserts the following in its proposed rulemaking:

The Commissioner is expressly authorized to promulgate rules, consistent with the Commissioner's authority to administer the Student Loan Servicing Act and the Student Loans: Borrower Rights law.

However, CFC Section 28106(a) requires that any rules and regulations and orders promulgated by the Commissioner be "consistent with that authority." As detailed herein, the Act, as adopted by the legislature, is limited to loans, and non-loan transactions are not covered by the Act. Thus, the Department's proposal to apply the Act to retail installment contracts and all other education financing products is not consistent with the Act and, therefore, the Department is acting outside of its legal and statutory authority and the legislative intent in proposing to administer the Act in this way. As a result, the Department's proposed administration of the Act to non-loan products can be subject to legal challenge.

California Association of Private Postsecondary Schools





***C. The Department Cites Incorrect Historical Information as a Basis for its Proposal to Apply the Act to Retail Installment Sales and Other Non-Loan Education Finance Products***

In its proposed rulemaking, the Department appears to not realize that use of retail installment sales to finance postsecondary education significantly pre-dates the Act. In its proposed rulemaking, the Department includes the following:

When the Act first became effective, student loans were comprised of federal student loans and private student loans, most commonly made by banks and credit unions (traditional loans). These traditional loans used traditional loan forms such as promissory notes and loan agreements.

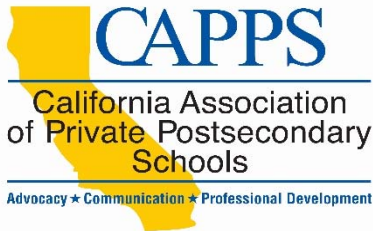
In the five years which have elapsed since the Act became effective, additional products to finance a student's higher education have emerged, such as income share agreements and installment contracts (collectively, education financing products), which commonly use documentation distinct from traditional loans to evidence the loan and contractual agreement to repay. These education financing products also use some terms which are different than terms used for traditional loans.

Lenders and servicers of education financing products have historically asserted that these products were not within the definition of student loan and not subject to the Act. However, these education financing products do the same thing as traditional loans: help pay the cost of a student's higher education. Thus, the Commissioner has determined that education financing products, including but not limited to income share agreements and installment contracts, are student loans and that servicers of such education financing products are covered by the Act and must be licensed. In providing this clarification, the proposed rules provide certainty for student loan servicers, including servicers of income share agreements, installment contracts and all other education financing products, and protect the borrowers they serve.

(Emphasis added)

The Department's statements incorrectly imply that retail installment sales and other forms of education financing products emerged only after the Act became effective in 2018. This is historically inaccurate.

California Association of Private Postsecondary Schools



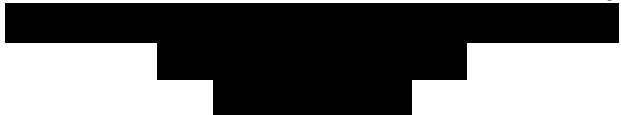
In our vast experience representing private postsecondary schools in California since the 1980s, we are extremely familiar with the use of education financing products by schools over this period, and we can confirm that retail installment contracts have been in widespread use by proprietary schools for many decades – long before the enactment of the Act. These incorrect statements in the Department’s proposed rulemaking suggest that the legislature might not have specifically addressed retail installment contracts and other non-loan products in the Act because retail installment contracts were not used by schools at the time the Act was drafted. However, use by schools of retail installment contracts for education financing was widespread long before the Act’s enactment. The fact that the California legislature did not define “student loan” to include retail installment contracts despite the widespread use by schools of retail installment contracts for decades prior to the Act is telling, and further supports the fact that the legislature did not intend the Act to apply to retail installment contracts and other non-loan education finance products. This is further evidence that the Department seeks to act outside of its authority in its proposed application of the Act to retail installment contracts and other non-loan education finance products.

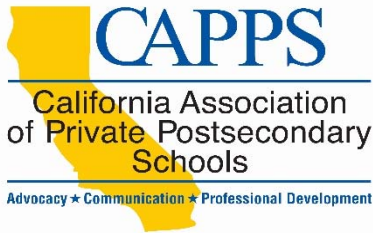
In light of the foregoing, the Department should retract the incorrect statements from its proposed rulemaking and should rescind its interpretation that installment contracts and all other education financing products are included in the definition of “student loan” set forth in the Act.

***D. The Department Should Not Retroactively Apply the Act to Retail Installment Contracts and Other Non-Loan Education Finance Products***

Notwithstanding the foregoing, if the Department decides to retain its proposed rule treating retail installment contracts and other non-loan products as loans, then the proposed rule should only be applied on a going-forward basis after a reasonable transition period of not less than one year. As we explain herein, the only reasonable interpretation of the Act is that it applies to loans only, and not to retail installment contracts and other non-loan products. Thus, it would be inappropriate to retroactively apply the Department’s interpretation on servicers of non-loan products, such as retail installment contracts, which have historically relied upon the plain reading of the Act and prior interpretations of California law (discussed above) to determine that they were not subject to the Act’s licensure and other requirements. In this case, the Department should provide servicers of non-loan products with sufficient time to bring their servicing operations into compliance with the Act. This delayed application should be sufficiently long to allow servicers to prepare and file a student loan servicer’s license application; identify, negotiate with, retain, and transition to an outside licensed servicer; or take other measures to ensure the servicers comply with the Department’s proposed interpretation of the Act.

California Association of Private Postsecondary Schools





### ***E. Questions to the Department***

We have established the fact that the California legislature and the Department have recognized the distinction between loans and retail installment contracts, and that the legislature has adopted separate statutory schemes for loans and retail installment contracts. Therefore, had the legislature wanted the Act to apply to non-loan products, such as retail installment contracts, the legislature would have drafted the Act accordingly. We believe the proposed regulation attempting to expand the definition of “loan” to include non-loan products goes beyond the statutory authority granted to the Department by the legislature. Consequently, we respectfully request the Department address the following questions with respect to the above-referenced proposed rulemaking:

Question #1 – Upon what statutory authority does the Department rely to determine that the Act applies to retail installment sales and other non-loan products, notwithstanding that the definition of “student loan,” as set forth in the Act, is limited to “loans?” What facts, evidence, data, and/or other sources have formed the basis for the Department’s conclusion that the Act applies to retail installment sales and other non-loan education finance products?

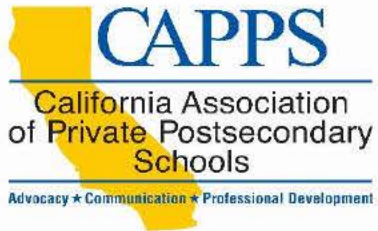
Question #2 – In light of the arguments raised in this comment submission, please identify the legislative authority for the Department to adopt an expanded interpretation of the Act as applying to retail installment contracts and other non-loan products.

Question #3 – We request that the Department make public and share data and/or evidence that the Department relied upon to make its determination that retail installment contracts and other non-loan products are included in the definition of “student loan” in the Act, as adopted by the California legislature. As before, we request information from the Department regarding the statutory authority to make the proposed regulatory change.

### **Conclusion**

We appreciate the Department’s consideration of our comment submission. We request a thorough review of the arguments, suggestions, and questions presented herein and we are confident of the Department’s attention to our concerns. While we are fully supportive of the Department’s efforts to regulate student loan products and servicers, we strongly believe that the Act should not be interpreted to apply to non-loan products, such as retail installment contracts. We request that the regulatory framework be compliant and consistent with the Act and other relevant provisions of California law and does not exceed the authorities provided by the California legislature.

California Association of Private Postsecondary Schools  
[Redacted Signature]



To the extent you have any questions, we would be happy to discuss our ideas with the Department.

Very truly yours,



Robert Johnson  
Executive Director  
California Association of Private Postsecondary  
Schools (CAPPS)

California Association of Private Postsecondary Schools

